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No. 01-1243

In the

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,
Petitioners,
v.

UNITED STATES ARMY CORPS OF ENGINEERS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the States of New Jersey, Hawaii, and West Virginia, as Amici Curiae in Support of Respondents

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INTEREST OF THE AMICI CURIAE

Pursuant to the Clean Water Act, the amici States have established water quality standards and goals for State waters, and have the primary right and responsibility to prevent, reduce, and eliminate water pollution. Amici States also have the right, but not the obligation, to conduct the permitting programs required by the Act in the place of the federal authorities. Consistent with the allocation of federal and State responsibilities set forth in the Act, the amici States cooperate with federal authorities in implementing a comprehensive program to eliminate water pollution and to improve surface and ground water quality. This comprehensive program includes the regulation of discharges into wetlands, which are considered waters of the United States under Section 404 of the Act, in recognition of the key water quality functions that wetland resources serve.

Petitioners argue that "deep ripping," which involves the movement of earth, rock, and sand horizontally and vertically in wetlands by dragging long metal shanks attached to a plow, and which has the effect of turning those wetlands into uplands, can occur without regulation under Section 404, because "deep ripping" does not involve a discharge of dredged and fill material into a water of the United States. Petitioners also argue that if "deep ripping" without a permit violates the Act, where many instances of "deep ripping" occur on a single day, only one violation occurs for penalty assessment purposes. Petitioners' cramped interpretation of what constitutes a discharge under Section 404, and how Section 404 can be enforced, could permit wetlands to be filled and destroyed without oversight, thereby eliminating waters of the United States that are critical to the maintenance of water quality.

Amici oppose an interpretation of Section 404 which would allow wetlands to be destroyed through "deep-ripping" without regulation, simply because the fill used to create the upland is a component of the soil beneath the wetlands. Interpreting Section 404 in this restrictive fashion

will facilitate the destruction of waters of the United States, undermine the efforts of the amici States to restore and maintain the quality of local waters, and upset the allocation of federal and State responsibilities established by Congress to restore and maintain the Nation's waters. Accordingly, amici urge this Court to hold that a permit is required under Section 404 if "deep ripping" or other soil movement conducted in wetlands converts the wetlands to an upland. Amici also urge the Court to affirm that there is discretion under the Act to consider each unpermitted discharge into wetlands as a separate violation for penalty assessment purposes.

SUMMARY OF ARGUMENT

The Clean Water Act was adopted to establish an all-encompassing program of water pollution control, and to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. §1251(a); *City of Milwaukee v. Illinois*, 451 U.S. 304, 318-19 (1981). The Nation's waters include wetlands, which filter and purify water draining into adjacent bodies of water and serve important biological functions. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Accordingly, the Act provides that a permit from the United States Army Corps of Engineers is required before fill material can be discharged into wetlands. 33 U.S.C. §1344.

Petitioners argue that "deep ripping," an activity which can convert a wetland to an upland by using soils from in, beneath, and around the wetland, is not subject to regulation under Section 404 because the practice does not involve the "discharge" of a pollutant from a "point source." Interpreting these terms in this overly technical fashion would undermine Congress' determination in the Act to establish a broad program of water pollution prevention, and would facilitate the destruction of waters of the United States that are critically needed to maintain water quality.

Although regulation of land uses is viewed as primarily a local matter, regulation of water pollution and the need to restore and maintain the Nation's waters has been recognized by Congress as a matter of national concern. Accordingly, in the Act, Congress mandated that the federal authorities fulfill certain responsibilities, which include the permitting of discharges of fill material into waters of the United States pursuant to Section 404 of the Act. Section 404 allows, but does not require, States to assume that permitting jurisdiction from the federal authorities. 33 U.S.C. §1344(g). Thus, restricting the ability of the federal authorities to regulate wetlands under Section 404 may impose on States an

obligation which Congress did not require the States to assume, and will upset the division of federal and State responsibilities contained in the Act.

In order effectively to protect the quality of local waters, States depend on the federal authorities to establish and implement the permitting programs required by the Act to regulate discharges into waters of the United States, including wetlands. Reducing federal regulation of discharges into wetlands, and thereby facilitating the destruction of wetlands, is likely to adversely affect water quality, thereby removing a safety net upon which States depend to fulfill their responsibilities under the Act. Limiting federal authority to regulate the destruction of wetlands will require States concerned about water quality and wetlands protection to assume the responsibilities now performed by the federal government, disrupting the existing balance between State and federal authority.

In addition, this Court should affirm that each unpermitted discharge of dredged and fill material into wetlands may be considered a separate violation of the Act for penalty assessment purposes. A contrary interpretation of the Act's penalty provisions would conflict with its plain language, and could provide an economic disincentive to comply with statutory requirements, thereby undermining the Act's goal: the restoration and maintenance of the Nation's waters.

ARGUMENT

RESTRICTING THE SCOPE OF ACTIVITIES THAT REQUIRE A PERMIT UNDER SECTION 404 OF THE CLEAN WATER ACT, AND THE REACH OF THE PENALTY PROVISIONS OF THAT STATUTE WILL UNDERMINE STATE EFFORTS TO ENHANCE WATER QUALITY AND WILL UPSET THE BALANCE OF STATE AND FEDERAL RESPONSIBILITIES SET BY CONGRESS.

The Clean Water Act established a comprehensive program of water pollution regulation, reflecting Congress' recognition that the prior program had been "inadequate in every vital respect." *City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981). The Act provided a new regulatory system, based on the principle that pollutants should not be discharged into the Nation's waters except pursuant to a permit. *Id.* To achieve its comprehensive, long-range goals, the Act prohibits any unpermitted discharge from a point source, and broadly defines a "point source" to include any discernible, confined and discrete conveyance from which pollutants are or may be discharged. *Id.* at 318. Similarly, the Act broadly defines pollution as any man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water. 33 U.S.C. §1362(19); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 719 (1994).

To meet the ambitious goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters, the Act requires a national program to eliminate

water pollution, and anticipates a partnership and a division of responsibility between the States and Federal Governments. 33 U.S.C. §1252; 33 U.S.C. §1254; *PUD*, 511 U.S. at 704; *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Thus, the Act recognizes that the States have the primary responsibility and right to reduce and eliminate water pollution, but does not require any State to regulate discharges into waters within its boundaries. Rather, the Act obligates the federal authorities to regulate discharges into waters of the United States, and allows States the option of either relying on federal enforcement authority or undertaking that function, provided that the State's regulatory program satisfies federal requirements. *Id.* at 102. Reliance on federal authority is of particular importance with respect to interstate migration of waters. If a discharge in one State will adversely affect the waters of a downstream State, the downstream State cannot block the discharge, but must seek relief from the federal authorities. *Id.* at 100. Thus, without federal participation, no State can ensure comprehensive protection of the quality of its waters.

Waters of the United States include freshwater wetlands, which enhance and protect water quality by filtering and purifying water draining into surface and groundwaters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Hence, the prohibition against unpermitted discharges contained in the Act properly applies to discharges of dredged and fill material into wetlands. *Id.;* 33 U.S.C. §1344. The Act assigns the responsibility for permitting these discharges to the Army Corps of Engineers, giving States the option, but not the obligation, to assume that federal function. 33 U.S.C. §1344(g). To date, only two States, New Jersey and Michigan, have assumed this federal obligation. However, other States ensure the protection of wetlands through Section 401 of the Act. That Section allows a State to object to the issuance of a federal permit, if the activities proposed to be permitted would be inconsistent

with the State's water quality standards and goals. *PUD*, 511 U.S. at 722-23.

Petitioners' argument that "deep ripping" within a wetland cannot constitute a discharge of fill material or a pollutant into a water of the United States elevates form over substance, and will permit the destruction of waters of the United States. The purpose of Section 404 is to protect waters of the United States such as wetlands by regulating their filling with dredged material, because this activity can eliminate the wetland and prevent it from serving key water quality and other functions. "Deep ripping" eliminates wetlands, by combining the soils in, beneath and around an existing wetland into a new soil composite which is then deposited into the wetland as a means of converting it to an upland. Once the wetland is converted to an upland, it may in the future be used for any purpose, whether exempt from Section 404 or not.

Clearly, an activity which causes the destruction of a water of the United States constitutes the sort of discharge that Section 404 was intended to address. The end result of "deep ripping" is the destruction of wetlands, an essential element of the Nation's waters and water protection system. Surely, Congress intended to subject this activity to federal regulatory authority, regardless of whether the material used to eliminate the wetlands is transported from another location or is ripped from the soil beneath the wetlands. The origin of the fill material cannot form a principled legal basis to distinguish "deep ripping" from other fill activity.

In addition, a holding that "deep ripping" is not subject to Section 404 will be detrimental to State efforts to promote water quality and may require States to assume an obligation that Congress intended to be fulfilled by the federal government, absent voluntary State assumption of that responsibility. The Act identifies States as the entities that are principally responsible for the maintenance of water

quality within their boundaries, and requires them to adopt water quality standards. *PUD*, 511 U.S. at 704. The Act, however, does not assign permitting authority over discharges to the States. Rather, the Act imposes that obligation on the federal government, and allows States to object to proposed federal permitting that would violate Sate water quality standards under Section 401. 33 U.S.C. §1341. This allocation of federal and State responsibilities was selected by Congress as the best way to achieve the comprehensive goals of the Act and is a basic component of the Act's regulatory scheme.

Adoption of petitioners' tortured interpretation of "discharge," "fill," and "pollutant" in the Act could jeopardize State efforts to control water pollution through State statutes which use identical or similar terms. While this Court's interpretation of those phrases as they appear in the Act will not mandate that those phrases be interpreted in the same way in State statutes, the Court's holding will certainly make a more expansive interpretation under State law more difficult to achieve. In addition, treating any category of discharges into wetlands as a local concern that can only be addressed on a State-by-State basis would contravene Congress' determination to impose minimum national standards to prevent water pollution. So long as wetlands are waters of the United States, the Act requires their protection to be subject to national permitting standards which the States may supplement. This Court should, therefore, affirm the Ninth Circuit's decision that "deep ripping" constitutes a discharge into wetlands subject to permitting under Section 404.

In addition to arguing that "deep ripping" is not a discharge of a pollutant under Section 404, petitioners also argue that the Act does not permit each instance of "deep ripping" to be treated as a separate violation for penalty assessment purposes. Adoption of petitioners' view on this issue would conflict with the plain language of the statute,

and undermine the comprehensive, all encompassing goals of the Act.

The Clean Water Act provides the federal authorities with a variety of enforcement options, including the ability to assess civil penalties of up to $25,000 per day for each violation of the Act. 33 U.S.C. §1319(d). This clearly is not a cap on the maximum daily penalty that can be imposed, but only is a cap on the daily penalty for any individual violation that occurs on a given day. The courts have consistently held that where a person commits more than one violation on a single day, a penalty exceeding $25,000 can be imposed for that day's violations. See, e.g, *United States v. Smithfield Foods, Inc.*, 191 F. 3d 516, 528 (4th Cir. 1999), cert. den., 531 U.S. 813 (2000); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F. 2d 1128, 1137-39 (11h Cir. 1990). In addition, the courts have held that where a discharge limitation is measured in more than a single day's period of time, a separate violation occurs on each day involved in the time period covered by the limitation. *United States v. Aluminum Co. of America*, 824 F. Supp. 640 (E.D. Tex. 1993)(violations of daily average limitations were violations for every day of the month); *Public Interest Research Group v. Star Enterprise*, 771 F. Supp. 655 (D.N.J. 1991)(violation of monthly average limitation constituted a violation for each day of the month); *United States v. Amoco Oil Co.*, 580 F. Supp. 1042 (W.D. Mo. 1984).

Congress' decision to allow a penalty of up to $25,000 per day for each separate violation is consistent with its determination to attack the problem of water pollution and the need to restore and maintain the Nation's waters in a broad, all-encompassing fashion. Moreover, allowing penalties to be assessed in this fashion permits a penalty to reflect more accurately the severity of the infractions, thereby serving as an effective deterrent. A person who commits multiple violations of a single requirement on a

single day should not be subject to the same penalty cap as a person who commits a single violation on a single day, as the former conduct likely will cause greater harm. Further, imposing the penalty cap urged by petitioners could provide an economic incentive for persons desiring to fill illegally waters of the United States to marshal sufficient resources to complete in a single day filling that would normally require multiple days to complete, thus reducing the anticipated penalty to an economically acceptable expense of converting wetlands to uplands.

The penalty provisions of the Act should be interpreted to avoid this result and to encourage maximum compliance with the Act, as a means of fostering the restoration and maintenance of the nation's waters mandated by Congress. Accordingly, the decision of the Ninth Circuit should be affirmed.

CONCLUSION

For these reasons, amici States urge this Court to affirm the decision of the Ninth Circuit.

Respectfully submitted,

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